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Nos. 642, 680, 691, 813, 814 and 815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

THE DELAWARE AND HUDSON CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ERIE-LACKAWANNA RAILROAD COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

CITY OF SCRANTON, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

MILTON J. SHAPP, *Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND BRIEF FOR APPELLEE, STATE OF NEW YORK

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MOTION TO AFFIRM AND BRIEF FOR APPELLEE, STATE OF NEW YORK

Questions Presented

1. Whether the District Court properly sustained the order of the Interstate Commerce Commission authorizing

a merger of the Pennsylvania Railroad Company and the New York Central Railroad Company?

2. Whether the District Court correctly held that the Interstate Commerce Commission under section 5 (2) of the Interstate Commerce Act could lawfully permit consummation of the merger, while leaving for future determination certain conditions subsequent imposed in connection with its authorization?

Statement

The appeals in these cases logically fall into several groups. The appellants in No. 813, City of Scranton ("Scranton"), and in No. 814, Milton J. Shapp ("Shapp"), attack the merits of the merger of the Pennsylvania Railroad Company ("Penn") and the New York Central Railroad Company ("Central") authorized by the Interstate Commerce Commission ("Commission") and sustained by the District Court.

The other groups of appellants take no issue with the merits of the Penn-Central merger, but attack the decisions below insofar as they would permit immediate consummation thereof. The appellants in No. 680, The Delaware and Hudson Railroad Corporation ("D&H"), and in No. 691, the Erie-Lackawanna Railroad Company ("E-L"), contend that they would be inadequately protected if the Penn-Central merger were consummated before the future fate of E-L, D&H and the Boston and Maine Corporation ("B&M")[1] has been finally determined, or at least until the traffic and indemnity provisions have been, upon reconsideration, completely spelled out.

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[1] The B&M, a complainant below, has not appealed and has stated that it is satisfied the Commission will adequately protect its interests.

The appellants in No. 642 are the Norfolk and Western Railway Company ("N&W"), the Chesapeake and Ohio Railway Company ("C&O"), and four other railroads in which the C&O, either directly or indirectly, has a controlling or large stock interest, namely, The Baltimore and Ohio Railroad Company ("B&O"), the Reading Company ("Reading"), The Central Railroad Company of New Jersey ("CNJ"), and Western Maryland Railway Company ("WM"). These railroads, along with the appellant in No. 815, Chicago & Eastern Illinois Railroad Company ("C&EI"), contend that protective conditions imposed by the Commission for the benefit of E-L, D&H and B&M would create a community of interest between the three protected carriers and the Penn-Central system and result in a diversion of traffic from the N&W, the C&O-B&O group, and the C&EI.

The Justice Department, in its Memorandum, emphasizes that it does "not quarrel with the merits of the Penn-Central merger proposal itself" (p. 21), but believes that "the Commission and the court below should not have allowed consummation of the Penn-Central merger until the fate of the smaller roads affected had been resolved" (p. 30).

In 1961 and early 1962, it became clear that the major railroads serving the northeastern part of the United States were moving toward the formation of three large competitive systems. On December 17, 1962, the Commission approved control by C&O of B&O and the latter's interests in its several so-called "family lines", Reading, CNJ and WM. *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261 (1962), sustained *sub nom. Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19, affirmed *per curiam*, 375 U. S. 216 (1963).

On June 24, 1964, the Commission approved the merger of the New York, Chicago & St. Louis Railroad Company ("Nickel Plate") into the N&W, the lease by N&W of the properties of the Wabash Railroad ("Wabash") and the Pittsburgh & West Virginia Railway Company, and the acquisition by N&W of stock control of the Akron, Canton & Youngstown Railroad Company, subject to certain conditions discussed below. *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1 (1964).

In the third of these three unification proposals, which is the one here involved, the Commission on April 6, 1966, approved the merger of Penn and Central, subject to certain conditions also discussed below. *Pennsylvania R. Co. —Merger—New York Central R. Co.*, 327 I.C.C. 475 (1966).

In all three of the proceedings, the C&O-B&O group, N&W, Penn and Central followed a policy of supporting, or at least not opposing, each other's affiliation proposals, although each unification would obviously have some impact on the other railroads. In the N&W merger proceedings, the Commission required, as a condition to its approval, that Penn divest itself of its large and controlling financial interests in the N&W, which Penn did in order to make possible the N&W-Nickel Plate-Wabash unification and its own merger with Central.

The present action is the result of: (1) the failure of E-L, D&H and B&M to move for and secure prompt inclusion in the N&W system, and (2) the decision by N&W and C&O to depart from the three-system plan originally contemplated by all involved and to move for only two systems, one consisting of a merged N&W-C&O and the other of Penn-Central.

In the N&W-Nickel Plate proceeding, E-L originally petitioned for inclusion, but during the hearings withdrew its inclusion petition when N&W agreed to negotiate with E-L *after* its proposed transactions were consummated.

D&H and B&M belatedly petitioned for inclusion after the hearings were closed. In its report, the Commission, in addition to requiring stock divestiture by Penn, conditioned its approval of the N&W's proposals on its retention of jurisdiction for five years to permit E-L, D&H and B&M to file petitions for inclusion and to direct affiliation of the three roads with N&W upon equitable terms, if found consistent with the public interest. In September of 1965, more than a year after approval of the N&W transactions, E-L, D&H and B&M finally filed petitions for inclusion.

In a recommended report and order served December 22, 1966, the hearing officer, Commissioner Charles A. Webb, recommended that the Commission authorize and direct inclusion of E-L and D&H in the N&W system and authorize but *not* direct inclusion of the B&M in such system. As one of the conditions, he recommended that the Commission require that none of the approved transactions be consummated unless and until the Penn-Central merger shall have been effectuated. A final decision by the entire Commission can reasonably be expected next spring.

The petitions of E-L, D&H and B&M for inclusion in the present N&W system are being opposed by N&W and C&O, which filed their own application for merger in October, 1965. (*Norfolk & Western Ry. Co.—Merger, Etc.—Chesapeake & O. Ry. Co.*, Finance Docket No. 23832.) N&W and C&O contend that inclusion of E-L, D&H and B&M in the N&W system should be accomplished only at a certain price and only as a condition to approval by the Commission of the proposed merger of N&W and C&O. The Commission, faced with this new turn of events, refused to consolidate the three petitions for inclusion in the reopened N&W-Nickel Plate proceeding with the N&W-C&O merger application and by order dated October 4, 1966, declined to proceed with hearings on the N&W-C&O merger application until further notice.

E-L, D&H and B&M also filed petitions for inclusion in the Penn-Central system, although making it clear that they preferred to, and more properly should, be included in the present N&W system.

The present actions were made possible by the imposition in the Commission's original report, as conditions to its approval of the Penn-Central merger, of certain novel traffic and indemnity provisions for the protection of E-L, D&H and B&M until those three roads become affiliated with the N&W or—if such affiliation is not found consistent with the public interest or cannot be directed on equitable terms—until the three roads are included in the Penn-Central system, as to which the Commission also left the door open.

E-L, D&H and B&M filed petitions for reconsideration, claiming that the protective conditions—which, incidentally, they did not even request—were inadequate, and asking that consummation of the Penn-Central merger be delayed until they have actually been included in the N&W system or, possibly, the Penn-Central system. N&W, which had theretofore not even intervened in the case, and the C&O-B&O group, which had intervened but had not opposed the merger, also filed petitions for reconsideration, claiming that the conditions imposed for the protection of E-L, D&H and B&M would result in a diversion of traffic from N&W and the C&O-B&O group to Penn-Central and the three protected lines. In its report and order on reconsideration, 328 I.C.C. 304, decided September 16, 1966, the Commission reopened the Penn-Central proceeding for further hearing with regard to modification of the protective conditions and possible addition of a capital loss indemnity provision (328 I.C.C. at 328).

Hearings on the question of capital loss indemnity have been completed, briefs filed and oral argument heard by the entire Commission on November 28, 1966. Hearings on the protective conditions were concluded on December 16,

1966, with briefs and reply briefs due to be filed on January 16 and February 6, 1967. No oral argument will be heard and the initial decision will be by the entire Commission.

E-L and D&H want consummation of the merger delayed until they have actually been included in the N&W system, or possibly, the Penn-Central system, at the best price possible and have been assured of complete protection in the meantime. N&W also seeks delay in consummation in order to realize the benefits from its recent unification with the Nickel Plate and Wabash and to improve its chances that the Commission will approve the N&W-C&O merger as the price for taking in E-L, D&H and B&M.

In view of the history outlined above, the suspicion of the court below that in these actions, E-L, D&H, N&W and the B&O-C&O group are mainly "jockeying . . . for price and position in respect of other mergers" (A39[2]) seems clearly well founded.

Summary of Argument

1. The court below was clearly correct in sustaining the Commission's order authorizing the Penn-Central merger and in denying an interlocutory injunction to prevent its consummation. Although the merged Penn-Central system would serve a large area covering numerous States and countless communities, only one individual and one city attack the merits of the merger. Shapp's standing to bring an independent action is extremely questionable, and neither he nor the City of Scranton took any significant part in the proceedings before the Commission. The Commission's approval of the merger is in accord with all the relevant statutory criteria. Neither Shapp nor Scranton advance any argument which could possibly justify revers-

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[2] Reference to pages of the opinion below as printed in the B&O's Jurisdictional Statement will be identified as "A- ".

ing on the merits the Penn-Central merger, so overwhelmingly supported by all other segments of the public.

2. Under section 5 (2), the Commission can permit consummation of a merger, while leaving for future determination conditions imposed in connection with its authorization. The Commission has done so in several other cases and this procedure has never been previously challenged.

a. Nothing in the statute requires that all conditions must be determined and completely spelled out before an authorized merger can be effectuated. Here the Commission has imposed stringent traffic conditions, subject to possible later modification, which would become effective upon consummation to protect E-L, D&H and B&M. It has merely left for future determination the method by which the damages or indemnity payments, if any, are to be computed in the event that the traffic conditions are unsuccessful in maintaining the *status quo* between Penn-Central and E-L, D&H and B&M.

b. There is no reason to believe that the Commission, upon further reconsideration, can not or will not impose conditions which will afford E-L and D&H all the protection to which they are entitled pending determination of their future fate. N&W and the C&O-B&O group expressed no concern about, and presented no evidence with regard to, possible diversion of their traffic by Penn-Central prior to the Commission's initial report in this case. It is highly unlikely that, because of the indemnity provisions ultimately adopted, E-L and D&H would try to divert traffic from N&W, their prospective parent, to Penn-Central, their future principal competitor. Even if some traffic during the protective period were diverted from N&W and C&O, which have recently consummated their own unifications, such diversion would not seem to violate any provision of the Interstate Commerce Act.

c. Prompt consummation of the Penn-Central merger would clearly be in the public interest by making possible

more economical and efficient service to the public, by insuring continuance of the vitally necessary passenger and freight services now being provided by the bankrupt New Haven, by generating savings which would enable Penn and Central to earn a more adequate rate of return on their investment in transportation property, and by speeding the inclusion of E-L and D&H in the N&W system.

Argument

In its order of October 18, 1966, granting a stay of enforcement of the Commission's order and the motions to accelerate, this Court referred to the actions herein as "appeals from a decision of a three-judge district court . . . sustaining the Commission's order." The Justice Department in its Memorandum states that "[n]o one questions that the district court's decision now under review must realistically be viewed as finally determining the merits of the Commission's action approving the merger" (p. 18), and it will be so treated herein.

POINT I

The court below was clearly correct in sustaining the Commission's order with regard to the merits of the Penn-Central merger.

Only two of the appellants, Scranton[3] and Shapp, attack the merits of the merger. These two appellants took little active part in the proceedings before the Commission. They requested no time and did not participate in the oral argument before the court below.

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[3] The eight communities in the court below had dwindled to six by the time of this Court's order of October 18, were reduced to two by the time appellants' briefs were filed on November 30, and subsequently further reduced to just one, the City of Scranton. As of this writing, Scranton is still an appellant.

No attempt will be made herein to deal with all the various arguments advanced by these two appellants, and this reply will be confined to those points which, at least superficially, might appear to have some substance.

Shapp, in his brief, describes himself as a Philadelphia businessman, a citizen of the Commonwealth of Pennsylvania, and a Penn stockholder. He has not shown that, as a result of the merger, he has suffered or been threatened with any damage or financial injury or that any definite legal right has been violated. His standing to bring an independent action is highly questionable, as discussed in the briefs filed by other appellees.

Scranton in its brief admits that it is not served by Penn or Central, but claims it would be hurt by the merger as a community in the Commonwealth of Pennsylvania because of the diversion of Penn's traffic now moving through Pennsylvania in favor of Central's routes via the State of New York.

In addition to their claims that the merger will harm the Commonwealth of Pennsylvania, both Shapp and Scranton express concern about its effects on labor. Suffice it to say that their fears are not shared by those for whom they voice concern, with neither the Commonwealth of Pennsylvania nor the labor organizations attacking the merger in any way.

As stated in the Scranton brief (p. 4), their arguments were dismissed summarily by a single sentence in the lower court's opinion. In view of their lack of merit and self-contradictory nature, the summary dismissal by the court below is readily understandable.

Shapp claims that the merger would hurt the Commonwealth of Pennsylvania because the "plan of merger is for a contraction of railroad facilities" (Br., p. 8). Three pages later, however, he seems to argue that there will be no reduction in the railroad plant, claiming that be-

cause of the increase in traffic levels, "the estimated savings from the proposed merger have evaporated since these savings were based upon a reduction in capacity to conform with anticipated lower levels of traffic" (Br., p. 11).

Again, Shapp claims the Commissioin erred in giving great weight to the inclusion of the New Haven in the transaction (Br., p. 26), and argues that as a result the citizens of the Commonwealth of Pennsylvania will somehow have to subsidize the New Haven's passenger operations (Br., pp. 29-31). Later, however, he argues that the uncertainty that the New Haven will ever be included compels issuance of an interlocutory injunction until its fate is determined (Br., p. 35).

The most serious arguments of both Shapp and Scranton are that the Commission and the court below misconstrued the provisions of section 5(2) and the National Transportation Policy in approving the merger. These arguments are clearly without merit.

Section 5(2)(c) (49 U.S.C. § 5(2)(c)) provides:

> "(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

No appellant raises any question as to (3), the resulting fixed charges.

As to (4), the interest of the carrier employees affected, Penn and Central reached an agreement with 23 unions

representing 75 percent of their employees (327 I.C.C. at 543), and the Commission imposed a condition requiring that the same generous protective conditions be applied to the affected employees not represented by the signatory unions (327 I.C.C. at 545, 552). Shapp argues that the Commission also should have imposed protective conditions for the benefit of employees of connecting carriers (Br., pp. 22-24). No protective conditions were sought by such employees or their representatives, they are not attacking the merger in any way, and Shapp does not even allege that he is authorized to represent their interests.

As to (1), the effect of the transaction on adequate transportation service to the public, the Examiners' report and the Commission's decision (327 I.C.C. at 491) spelled out numerous service advantages to shippers which will result and the more economical and efficient use of Penn-Central's transportation facilities which will be made possible. Shapp contends that the merger plan contemplates a contraction of railroad facilities in the Commonwealth of Pennsylvania (Br., p. 8), but later argues the reverse, claiming that recent increased traffic levels will not permit a reduction in capacity (Br., p. 11) or elimination of excess capacity (Br., p. 17). Actually, the merger will benefit the Commonwealth of Pennsylvania in many ways. For example, as pointed out in the Examiners' report, the locomotive repair facilities at Enola, Pa., will be enlarged; the heavy locomotive repairs will be performed at Altoona, Pa.; and all heavy maintenance and construction of conventional freight cars will be performed at Hollidaysburg, Pa. (Ex. Rpt., pp. 126-127). Even if some traffic now moving via Pennsylvania is rerouted to the Central's water-level route via New York State, this would improve, not diminish, the adequacy of the transportation service to the "public," which in this case embraces much more than just the Commonwealth of Pennsylvania. As stated in the Commission's report, "the

merger has met with the almost unanimous approval, in principle, of shippers throughout the Nation" (327 I.C.C. at 491). Clearly, the merger will improve the adequacy of transportation service to the public.

As to (2), the Commission in this case, probably more than in any other section 5 proceeding, considered the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved. As conditions to its approval, the Commission required Penn-Central to include the New Haven and the New York, Susquehanna and Western Railroad Company and retained jurisdiction to entertain a petition for inclusion by Brooklyn Eastern District Terminal Railroad (327 I.C.C. at 552-553). It imposed conditions for the protection of E-L, D&H and B&M (327 I.C.C. 561-563) and also retained jurisdiction to receive petitions of these three roads for inclusion in the Penn-Central system, should their petitions for inclusion in the N&W system be unsuccessful (327 I.C.C. at 553-554). At no time before the initial report did N&W or the C&O-B&O group ask for any special protective conditions or present any evidence that they would in any way be harmed by the Penn-Central merger. Indeed, even in their petition for reconsideration filed June 16, 1966, C&O and B&O stated (p. 2):

> "C&O-B&O do not oppose the merger of PRR and NYC. C&O-B&O recognize the great need for railroad consolidations in the East, and that the consolidation of PRR and NYC will substantially strengthen both these carriers, will generate very large savings, and should contribute to the adequacy of the national transportation system."

Based on the specific statutory criteria set forth in section 5 (2) (c), the Commission was clearly correct in approving the merger and the district court equally correct in sustaining the Commission's order.

As to his argument with regard to the National Transportation Policy (49 U.S.C. preceding § 1), Shapp does not contend that there is any evidence in the record to indicate that the merger would be detrimental to the national defense, but rather is critical of the Commission's failure to solicit defense testimony (Br., p. 26). He does not explain why, if he felt such testimony necessary, he did not solicit it or present it himself. As to the needs of the postal service, the Examiners found that the merger will result in more efficient handling of mail at New York and Chicago (Ex. Rpt., pp. 125-126). In its report, the Commission pointed out (327 I.C.C. at 520):

> "To the extent the Post Office and Defense Departments elect to use applicants' services in ordinary times, the benefits of the merger will accrue to them as to all users. To the extent the merger invigorates the applicants and, by reaction, stimulates their competitors, the Nation's transportation system will grow that much more capable of withstanding the extraordinary stresses of war or other national emergency."

Thus, such evidence as there is in the record indicates that the merger would be beneficial, not harmful, to the needs of the postal service and of the national defense.

Shapp does not mention other objectives of the National Transportation Policy which would clearly be furthered by the merger. The improved service, estimated merger savings, and improved net income would obviously promote "adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers." Similarly, inclusion of the bankrupt New Haven with its vitally necessary freight and passenger services would clearly help to preserve "a national transportation system by . . . rail . . . adequate to meet the needs of the commerce of the United States."

In summary, the appeals of Shapp and Scranton are completely devoid of any substance and should be summarily dismissed by this Court as they were by the court below. Nothing advanced by either of them could possibly justify a reversal by this Court of the lower court's opinion sustaining the order of the Commission as to the merits of the Penn-Central merger, so overwhelmingly supported by virtually all other segments of the public.

POINT II

The court below was clearly correct in holding that the Commission could lawfully permit consummation of the merger, while leaving for future determination certain conditions imposed in connection with its authorization.

Since almost all of the arguments advanced by the railroad appellants stem from the protective conditions for the benefit of E-L, D&H and B&M, it is necessary to examine what the Commission did and is doing in this regard.

In its original report the Commission stated (327 I.C.C. at 532):

> "On this record, therefore, we conclude that immediate consummation of the proposed merger would be consistent with the public interest, if conditions are imposed to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections.
>
> "It is doubtful that, without their inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger."

To this end the Commission in Appendix G (327 I.C.C. at 561) prescribed traffic conditions providing for the temporary preservation by Penn-Central of present practices and patterns, as to both routes of movement and volume, on traffic for which E-L, D&H and B&M compete with Penn-Central and other railroads making up the proposed system, pending final determination of the petitions filed by E-L, D&H and B&M in the reopened N&W-Nickel Plate proceeding and in the instant proceeding, or such other period as the Commission may prescribe.

In addition, the Commission prescribed indemnity provisions—aptly described by the court below as "a backstop in the unproved eventuality that the special traffic conditions should not prove effective" (A-28, 29)—providing for the payment of an indemnity by Penn-Central to E-L, D&H and/or B&M whenever, in a given year, the revenues of E-L, D&H and B&M are, as to each of them, proportionately less than the combined revenues of each protected carrier and Penn-Central, as computed on the basis of the relationship existing between such revenues for the year 1964. The so-called indemnification factor was to be based on each protected carrier's average freight-operating ratio for the years 1962-65, inclusive (327 I.C.C. at 532-533).

In substance, what the Commission did was to make Penn-Central liable to E-L, D&H and B&M if the prescribed traffic conditions—which the court below correctly described as "unprecedented in their severity in the history of railroad mergers" (A-10, 11)—did not achieve their objective of maintaining the *status quo*, and prescribed the formula by which any damages, or indemnity, would be fixed.

Penn and Central accepted the conditions laid down by the Commission, but E-L, D&H and B&M petitioned for reconsideration, claiming the protective conditions were inadequate and seeking various modifications in the traffic and indemnity provisions and a condition requiring them to be

compensated for any diminution in their value as going concerns. N&W, the C&O-B&O group and the C&EI[4] also requested reopening to receive evidence as to traffic which would allegedly be diverted by Penn-Central from their respective systems and as to the impact of the protective conditions upon their systems.

The actions in the court below were brought about 10 days before the Commission issued its report on reconsideration on September 19, 1966. In that report, the Commission denied the requests for further postponement of the consummation of the merger beyond September 30, 1966, but reopened the proceedings for limited further hearing to determine: (1) in what respect the protective provisions should be modified; (2) what, if any, modification is needed to prevent traffic manipulations; and (3) whether or not a capital loss indemnification provision should be imposed. The traffic provisions would remain in effect pending further consideration, but the indemnity provisions previously prescribed were rescinded and any indemnity provisions later decided upon would be made applicable retroactively to the merger consummation date (328 I.C.C. at 328-329).

After hearing argument on the motions on September 21, 1966, the court below granted leave until September 27 to file additional briefs, temporarily restrained consummation of the merger, and on October 4 denied the motions for a temporary injunction. These appeals followed.

The railroad appellants, in urging that consummation of the merger must be delayed, here advance two basic argu-

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[4] The Commission found that the "C&EI undoubtedly will have the benefit of intensified competitive efforts by the carriers with which it connects on routes competitive with those of [Penn-Central]. And in the event its affiliation with Missouri Pacific is realized, C&EI will be further strengthened—as to finances, equipment, traffic, solicitation force and other important factors—further fortifying it against the competitive effects of applicants' merger" (327 I.C.C. at 541-542). The C&EI's arguments are clearly without merit and will not be dealt with separately herein.

ments: (1) where the Commission authorizes a proposed carrier affiliation subject to conditions, section 5 (2) requires that all such conditions be specifically determined and completely spelled out before the approved affiliation can be consummated; and (2) the indemnity provisions prescribed by the Commission on reconsideration may be inadequate to accord full protection to E-L and D&H or may be so generous that they will create a community of interest between the protected lines and Penn-Central and result in a diversion of traffic from N&W and the C&O-B&O group to Penn-Central and E-L, D&H and B&M.

A. Under section 5 (2), the Commission may permit consummation of a transaction authorized by it, while leaving for future determination the exact provisions of conditions imposed in connection with its approval.

Section 5 (2) (b) (49 U.S.C. § 5 (2) (b)) provides that the Commission shall enter an order approving a proposed transaction which it finds will be consistent with the public interest, "subject to such terms and conditions and such modifications as it shall find to be just and reasonable." Under section 5 (9) (49 U.S.C. § 5 (9)), the Commission may, for good cause shown, make such orders, supplemental to any order made under section 5 (2), as it may deem necessary or desirable.

In their Jurisdictional Statement, N&W and the C&O-B&O group state that the "basic error of the Interstate Commerce Commission in this case is its failure to provide essential protection for other Eastern railroads affected by the Penn-Central merger prior to the consummation of that merger" (p. 13).

In deciding recent carrier affiliation applications under section 5 (2), the Commission has frequently imposed conditions in connection with its approval. In some cases, the conditions had to be carried out prior to consummation of the merger; in other cases, the conditions were to become effective at the time of consummation; and in still other

instances, the exact nature of the conditions was left for future determination after consummation. This procedure is clearly permitted and contemplated under sections 5 (2) and 5 (9).

Probably the best example of a case where the Commission has imposed all three types of conditions is the N&W-Nickel Plate proceeding decided in 1964. There Penn was required, prior to consummation, to deliver to independent trustees all the voting rights in N&W stock it then held (324 I.C.C. at 49). Upon consummation, N&W and WM, with respect to each other, were required to maintain and keep open all routes and channels of trade via existing junctions and gateways, continue existing traffic and operating relationships, etc. (324 I.C.C. at 145). Finally, the Commission retained jurisdiction for 5 years to permit the filing of petitions by E-L, D&H and B&M for inclusion in the N&W system (324 I.C.C. at 148).

Neither N&W nor anyone else attacked the Commission's decision because it left the condition as to inclusion of E-L, D&H and B&M for future determination after consummation of the N&W-Nickel Plate-Wabash transaction. Yet, if all conditions must be determined before consummation, as N&W now seems to argue, then N&W's consummation of its merger with the Nickel Plate in 1964 was unlawful.

In its original report herein the Commission stated that it would not authorize immediate consummation of the Penn-Central merger unless E-L, D&H and B&M are protected during the period necessary to determine their future (327 I.C.C. at 532). To provide such protection, the Commission imposed traffic conditions and indemnity provisions which would be operative in the event the traffic conditions failed to achieve their objective. Upon petitions by E-L, D&H and B&M seeking even more favorable provisions, the Commission in its report on reconsideration set further hearings and rescinded the indem-

nity provisions previously prescribed, but made the traffic protective conditions effective upon consummation and stated that any indemnity provisions subsequently adopted would be made effective retroactively to the consummation date. In effect, the Commission on reconsideration decided that the traffic conditions may provide adequate protection for the three roads and the question of determining damages, if any, could be left for future determination.

There are two points which should be kept in mind in considering this question. First, the traffic conditions might be completely effective in maintaining the *status quo*, so that the question of how indemnity payments should be computed would be completely academic. Secondly, because of the delay in consummation, modified indemnity provisions may be prescribed before the merger is actually effectuated.

The above possibilities might be construed as supporting the Justice Department's suggestion that "the Court continue its stay and hold the case for a reasonable time after the scheduled arguments" (p. 32), but this is not so. If the consummation is further delayed, it would serve as an incentive, if one be needed, for N&W and the C&O-B&O group to seek review of any indemnity provisions adopted by the Commission and any order of the Commission directing inclusion of E-L and D&H in the N&W system and to seek further delay pending court proceedings.

The Commission clearly has the power—and in this case properly exercised such power—to permit consummation of the merger, while leaving the question of indemnity provisions for future determination.

B. The arguments that the protective conditions prescribed by the Commission may be inadequate to protect E-L and D&H or so generous as to divert traffic from N&W and the C&O-B&O group clearly do not justify any further delay in consummation of the merger.

B&M, one of the three "protected" lines, has not appealed and is satisfied that the Commission will adequately protect its interest. Of the other two protected lines, E-L's counsel in this case state in their brief (p. 53):

> "It is no answer to say that the Commission may adopt an indemnification condition which will be retroactive to the date of the merger and will make up for the deficiencies in the Appendix G traffic conditions. There is nothing remotely approaching an assurance that it will do so."

This is somewhat at odds with the argument advanced by other E-L counsel in the reopened N&W-Nickel Plate proceeding (F. D. No. 21510). In the reply brief filed by E-L in that case on October 19, 1966, after the action had been brought in the court below, it was stated (pp. 13-14):

> "Second, the Commission has made clear its intention to protect EL against any loss of traffic to Penn-Central (*Penn-Central,* 327 I.C.C. at 531-34). While the precise nature of such protective provisions is subject to further hearings as a result of the Report and Order of September 16, 1966, we are confident that the Commission can and will devise conditions which will protect EL against any interim loss of earnings due to diversion of traffic to Penn-Central before EL is included in N&W."

In view of the Commission's obvious concern for the three "protected" lines, any fears that the protective provisions ultimately framed will not afford them all the protection to which they are entitled are clearly not well founded and do not justify any further delay in consumma-

tion of the merger. E-L and D&H evidently assume that, since the Commission prescribed indemnity provisions in its original report, they are entitled to such provisions as a matter of right and to have them spelled out in detail before the merger is consummated. This is not so. As the court below stated (A-24):

> "If the Interstate Commerce Commission had initially prescribed only the special traffic conditions and reserved jurisdiction to reconsider these with a view to strengthening them and also to imposing an indemnity, with the Transportation Company bound to accept such changed or additional conditions if it consummated the merger, we would surely not have found the order formally defective under § 5 (2) (b) at the suit of other carriers. Yet the only difference between such an order and what has happened is that the Commission initially prescribed financial conditions and then withdrew them for further consideration, with power to impose new conditions retroactively to the date of merger. On the assumption most favorable to the three protected lines, namely, that the Commission first considered the indemnity provisions necessary to afford full protection to them and now, confronted with some of the problems such provisions create, is not so sure of their desirability or essentiality, as one member was not from the outset, 327 I.C.C. 551, the Commission would simply have exercised the prerogative of considering whether it should change its mind on the method best adapted to attain its objectives."

The critical finding of the Commission was that conditions must be imposed "to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections" during "the period necessary to determine their future"

(327 I.C.C. at 532). This the Commission is bound to do in its report on further reconsideration, and in all likelihood the conditions will include indemnity provisions. If, however, the evidence on further hearing indicates that indemnity provisions are not necessary to prevent impairment or serious weakening of the three lines during the protective period,[5] the Commission is not required to prescribe indemnity provisions and is certainly not obligated to frame such conditions prior to consummation of the Penn-Central merger.

As to N&W and the C&O-B&O group, their actions are readily understandable. Now that two-thirds of the three-system railroad plan for the Northeast has been completed and the N&W-Nickel Plate-Wabash and C&O-B&O unifications have been effectuated, N&W and C&O want to keep the situation as it is as long as possible. By delaying consummation of the Penn-Central merger, N&W and C&O can continue realizing the benefits from their own consolidations and improving their competitive positions. In this respect they are being helped by E-L and D&H, which persist in trying to delay consummation of the Penn-Central merger until their own future fate is determined.

In their Jurisdictional Statement, N&W and the C&O-B&O group state that "despite the 'rescission' of the indemnity for the time being, the Commission has made it plain that, after hearings, the indemnity will be restored and made retroactive to the date of consummation" (p. 27). From this they argue that the indemnity provision will create a community of interest between Penn-Central and the protected lines under which Penn-Central would divert traffic from N&W and the C&O-B&O group to the protected lines in order not to pay any indemnity and the protected lines would divert traffic from the N&W and

[5] In view of the speed with which the Commission is deciding the question of protective conditions and the inclusion of E-L and D&H in the N&W system, the protective period will be very short, if the Penn-Central merger is allowed to be consummated promptly.

the C&O-B&O group to Penn-Central in order to increase the indemnity which they would receive.

This argument is as meritless as it is ingenious.

At no time during the Penn-Central hearings did N&W or the C&O-B&O group present any evidence that they would suffer any diversion of their traffic to Penn-Central. At that time, of course, they were more interested in getting their own unification proposals approved. In the C&O-B&O case, Central presented evidence to show that it would suffer substantial diversion of its traffic to C&O-B&O (317 I.C.C. at 320), but later withdrew its opposition to the C&O-B&O application after emergence of the three-system plan.

After having expressed no concern about the diversion of their traffic to Penn-Central itself, N&W and the C&O-B&O group now ask this Court to believe their asserted fears that Penn-Central would be able to divert large amounts of N&W and C&O-B&O traffic, not to itself, but to E-L, D&H and B&M. They also ask this Court to take seriously their claim that E-L and D&H, potential affiliates of N&W, would adopt a policy of trying to divert traffic from their prospective parent to Penn-Central, their future main competitor.

Even in the unlikely event that N&W and the C&O-B&O group would lose some traffic as a result of the indemnity provision, this would not justify further delay in consummation of the merger. The court below stated (A-27):

> "'We should make clear that we do not necessarily subscribe to the premise, implicit in the argument of these carriers, that any temporary diversion to the protected roads or to the merged company as an incidental result of indemnity provisions would constitute an injury forbidden by the Interstate Commerce Act, especially with respect to roads that have themselves been the recent beneficiaries of merger."

If N&W and the C&O-B&O group are serious about their fears that the protected lines would divert traffic from them to Penn-Central, they should in their briefs urge the Commission on further reconsideration to impose a "hold-down" in connection with the indemnity provisions which would eliminate any alleged incentive for the protected lines to adopt such a policy. This would be in the form of a proviso that the protected lines would receive no indemnity, even though their freight revenues in relation to those of Penn-Central declined, if their revenues in relation to those of N&W and C&O-B&O group remained the same or increased during the protective period.

Finally, it should be pointed out that, regardless of the indemnity provisions, the traffic conditions imposed on Penn-Central for the benefit of the protected lines would also tie Penn-Central's hands in competing for traffic for which N&W and the C&O-B&O group compete with the protected lines. For example, between Chicago and New York, the traffic conditions would prevent Penn-Central from improving their service, while the protected lines and N&W and the C&O-B&O group remain completely free to take whatever action they please to improve their competitive position vis-a-vis Penn-Central.

In summary, there is no reason to believe that the Commission cannot or will not impose conditions which will afford E-L, D&H and B&M all the protection to which they are entitled[6] or that such conditions will result in any unlawful diversion of traffic from N&W or the C&O-B&O group during the protective period.

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[6] "We see no basis for disagreeing with the testimony of the chairman of both E-L and D&H (a former president of New York Central) in Finance Docket No. 21510, that E-L would not 'be substantially and adversely affected immediately upon consummation of [the Penn-Central] merger,' and that 'the effects would begin to be felt perhaps in the second year, and not in the first year.'" (328 I.C.C. at 312)

C. Prompt consummation of the Penn-Central merger will clearly be in the public interest.

Consummation of the Penn-Central merger will complete the formulation of three major competitive rail systems in the Northeastern part of the United States. To be sure, there will be some diminution in rail competition, but the advantages far outweigh the disadvantage of less competitive rail service.

The merger will provide a solution to the problem of the bankrupt New Haven, which otherwise would probably have no alternative but liquidation, in spite of the fact that its passenger and freight services are so vitally necessary to the areas which it serves.

The merger will make possible, particularly after the protective period has ended, more economical and more efficient service to the shipping public.

The savings from the unification will enable the merged system to earn a rate of return on its investment in transportation property comparable to that earned by prosperous railroads such as the N&W and C&O and companies in other fields.

It is unfortunate that the culmination of an event which will bring so many benefits is being held up by the action of two roads which would almost certainly also benefit therefrom. It is even more ironic that these two roads, with regard to which the Commission has adopted perhaps an overly protective attitude, are now holding up the merger on grounds of alleged lack of protection.

As mentioned earlier, E-L originally petitioned for inclusion in the N&W-Nickel Plate-Wabash transactions but withdrew its petition during the course of the hearings, and D&H did not seek to intervene until after the hearings were completed. In approving the N&W transactions, the Com-

mission retained jurisdiction to permit the subsequent filing of petitions for inclusion by E-L and D&H in the N&W system, and in his recommended report and order served December 22, 1966, Commissioner Webb recommended that the Commission authorize and direct such inclusion.

Had the Commission, in trying to protect E-L and D&H in connection with approval of the Penn-Central merger, confined itself in its original report to the imposition of the extremely severe traffic conditions, a Penn-Central system would probably now be a reality. At that stage, N&W had not intervened and the C&O-B&O group during the hearings had raised no objection to the merger, so that they would not have any grounds on which to seek review. Shapp and Scranton, who did not even seek time for oral argument in the court below, would almost certainly not have brought their own actions if they had to carry the fight alone.

The Commission, however, also imposed indemnity provisions. E-L and D&H, instead of accepting the added protection which they had not requested, sought even more favorable terms, and N&W and the C&O-B&O group, having decided to abandon their policy of benevolent neutrality, latched on to the indemnity provisions as their excuse for getting into court and seeking to delay consummation of the merger.

The actions of E-L and D&H are extremely difficult to understand, since it seems obvious that the sooner there is a Penn-Central system the sooner those two lines, and possibly the B&M, will be included in the N&W system. N&W objects to taking in E-L and D&H now, hoping that this will come about later as a condition to approval of its proposed merger with C&O, but it would object even more strenuously to inclusion of E-L and D&H in the Penn-Central system, an alternative which the Commission has

left open. The court below stated (A-10, ftnote 4):

> "The State of New York, which is served by all three protected lines, as well as by the proposed merged carrier, argues with some plausibility that consummation of the merger would act as a spur to bringing these roads and the N&W together on a basis fair to all; the Commission could well have had that in mind when authorizing immediate consummation."

In commenting in its brief on the above quotation, E-L states (p. 80):

> "The argument which the majority considered had 'some plausibility' was simply a notion advanced by counsel for the State of New York before the three-Judge Court (R. 2894-2899). We do not find that the same counsel for the State of New York put forward such a notion in the State's reply, filed August 1 with the Commission, to the petitions for reconsideration . . .".

Actually, the benefits to E-L, D&H and B&M from prompt consummation of the Penn-Central merger was one of the principal points stressed by the State in its reply to petitions for reconsideration filed August 1, referred to by E-L, as shown by the following quotations from that document:

> "The position of the State of New York is that consummation of the Penn-Central merger should be allowed to take place as promptly as possible; . . . and that inclusion of E-L, D&H and B&M in the N&W system, which the State strongly supports, will be expedited if the Commission does not further postpone the effective date of its order herein beyond September 30, 1966." (pp. 1-2)
>
> "The insistence of E-L, D&H and B&M upon a delay in the consummation date is difficult to understand, in view of the fact that such a delay would

hurt, not help, them. The evidence indicates clearly that until the Penn-Central merger becomes a reality, the N&W will do everything possible to delay inclusion of E-L, D&H and B&M in the N&W system, in which they belong, but that if the Penn-Central merger is consummated, N&W will promptly affiliate with the three petitioners." (p. 6)

"If consummation of Penn-Central is delayed pending further hearings on the indemnification provisions, N&W would probably seek reconsideration of any Commission decision granting the petitions, appeal it to the Courts, etc., in order to delay taking in the three petitioners." (p. 6)

"The sooner Penn-Central is a reality, the sooner E-L, D&H and B&M will become a part of the N&W system, the system in which they properly belong." (p. 8)

E-L provides extensive service within the State of New York and in some areas provides the only rail service available to many important industries. It has received substantial tax relief from the State in recent years. The State is vitally concerned about the future fate of E-L, but is convinced that if the Penn-Central merger is consummated, the Commission will impose conditions which will afford E-L and D&H ample protection until they are included in the N&W system and that consummation of the merger will expedite such inclusion.

The N&W and the C&O-B&O group, who already have their slices of the cake, will undoubtedly be faced with a more formidable competitor when Penn-Central is consummated. Otherwise, the shipping public, the States involved, Penn, Central and virtually all of the other carriers in the involved territory will benefit from prompt consummation of the merger.

CONCLUSION

Appellee requests that this Court affirm the decision and order of the court below and permit the Penn-Central merger, already too long delayed, to be consummated immediately.

Respectfully submitted,

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